

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL WILLIAM TERRY,

Defendant-Appellant.

UNPUBLISHED

January 31, 2012

No. 299620

Wayne Circuit Court

LC No. 10-004306-FC

Before: GLEICHER, P.J., and CAVANAGH and O'CONNELL, JJ.

O'CONNELL, J. (*concurring in part and dissenting in part*).

In the predawn hours of a March morning, defendant hunted for his ex-girlfriend, Johneisha Lloyd, eventually finding her in a local pharmacy store. After angrily confronting Lloyd in the store, defendant stormed outside with gun in hand to settle the matter with Roosevelt Garner, Lloyd's current boyfriend. Defendant shot and pistol-whipped Garner. But for the trajectory of the bullet, defendant could have faced a crime that carries a sentence of life imprisonment.

The trial judge presided over defendant's trial on the charges of assault with intent to murder, MCL 750.83, assault with intent to do great bodily harm, MCL 750.84, felonious assault, MCL 750.82, and felony-firearm, MCL 750.227b. The jury found defendant guilty of felonious assault and felony-firearm.

At sentencing and in the written departure memorandum, the trial judge, in very clear terms, stated he did not believe defendant's story that his encounter with Lloyd and Garner at the pharmacy at 4:00 in the morning was a coincidence. Even more importantly, the trial judge indicated that he did not believe defendant's story that the gun fired accidentally.¹ The judge determined that defendant was the aggressor and that after shooting Garner, defendant viciously beat Garner with the gun.

¹ Defendant's explanation for his actions is that Garner would not relinquish the car keys to him, and that defendant did not want anyone driving the vehicle he had provided for Lloyd's use. This explanation is devoid of any rational basis in a civilized society and only serves to emphasize defendant's inability to control his actions.

The majority concludes that the trial judge articulated substantial and compelling reasons for a valid departure sentence. With this obvious conclusion I most certainly agree. But, the majority then concludes that a remand is necessary for the trial court to articulate the grounds for the particular departure from the sentencing guidelines on the felonious assault conviction. I disagree.

A trial court's articulation of the grounds for a particular departure must be "sufficiently detailed for appellate review." *People v Smith*, 482 Mich 292, 311; 754 NW2d 284 (2008). To uphold a departure sentence, this Court must review the whole record and determine whether the connection between the reasons given for departure and the extent of departure are clear. *Id.* at 314. We may not speculate about the trial court's reasons for a departure sentence, but we may (and should) consider whether the reasons can be reasonably inferred from the record. See *id.* at 318. We must vacate departure sentences that are based on "aberrational or idiosyncratic" sentencing decisions. *Id.* at 321 (Markman, J., concurring).

Here, there is nothing aberrational or idiosyncratic about the trial judge's decision. Rather, the judge expressly and rationally stated the grounds for the extent of the departure. At the outset of the sentencing hearing, defense counsel requested that the sentence be limited to the two year felony-firearm term of imprisonment. The judge rejected the request and explained, "I intend to give him as much as I can [on the felonious assault conviction]." No inference is necessary to recognize that the phrase "as much as I can" meant that the judge chose to impose the maximum available sentence.

Although my colleagues in the majority may, like me, be less than mathematically inclined (hence our decision to pursue law degrees), we need not be mathematicians to deduce the basis for the degree of departure here. The statutory maximum sentence for felonious assault is 48 months. MCL 750.82. A departure sentence cannot exceed two-thirds of the statutory maximum sentence. MCL 769.34(2)(b). The trial court imposed a minimum sentence of 32 months. By my calculation (and plainly the calculation of the trial court), 32 months is exactly two-thirds of 48 months. The trial judge thus imposed exactly the degree of departure he intended to impose, for the substantial and compelling reasons the judge described during the remainder of the sentencing hearing. The trial judge's comments during sentencing were direct, to the point, uncomplicated, and clear. If confronting an ex-girlfriend at 4:00 in the morning in a public area, transporting a drawn pistol to the parking lot to resolve a non-existent dispute with the new boyfriend, and then shooting and pistol-whipping the new boyfriend are not sufficient reasons to sentence a defendant to the maximum sentence for felonious assault, I am not sure what other reasons this judge could have articulated.²

But for the fact that Garner survived defendant's attack, a proportionate sentence for this crime could very well have been life imprisonment. Considering the trial court's sentence of 32 to 48 months and relating that sentence to defendant and his irrational behavior in stalking Lloyd

² I observe that felonious assaults do not regularly involve pistol-whipping and the discharge of a gun that injures another individual. In my opinion, this reason alone is sufficient to justify the extent of the trial court's departure sentence.

and shooting Garner, the grounds for the extent of the departure sentence are very clear. In my opinion, it is a waste of judicial resources to remand this case to the trial judge to re-enunciate why he sentenced defendant to two-thirds of the maximum sentence for felonious assault.

I would affirm the learned trial judge's departure sentence and his articulated reasons for the extent of the departure.

/s/ Peter D. O'Connell